Committee on Resources

Witness Testimony

TESTIMONY OF
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U.S. DEPARTMENT OF COMMERCE
BEFORE THE
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Mr. Chairman and members of the Committee, I am pleased to be here today on behalf of the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA). NMFS is a partner with the U.S. Fish and Wildlife Service (FWS) in administering the Endangered Species Act (ESA) and works with other agencies, states, Tribes, industries and private landowners to implement the Act. We are responsible for protecting many endangered species that live in the ocean and coastal waters of our nation. Some of the more familiar species that we protect are Pacific and Atlantic salmon, steelhead trout, sea turtles, whales, Hawaiian monk seals and steller sea lions.

I welcome the opportunity to discuss with you today the manner in which we implement the ESA in our five Regions. First, I want to emphasize that NMFS and FWS have taken many steps to ensure that the two agencies are implementing the Act consistently. These efforts began earnestly in 1994 when Interior Secretary Babbitt and NOAA Administrator Baker announced a series of policy reforms and legislative ideas to improve the effectiveness of the ESA by making it easier for citizens to understand and by tapping into its flexibility for businesses and private landowners. To carry out the Administration's IO Point Plan, NMFS and FWS have developed joint polic;es and guidance on almost every aspect of the ESA including section 7 consultations, Habitat Conservation Plans, assurances to private landowners (No Surprises, Safe Harbor and Candidate Conservation Agreements,) scientific peer review, scientific information standards, public participation in developing and implementing recovery plans, and the role of state agencies. A Secretarial Order on the ESA and Federal-Tribal trust responsibilities has also been issued. We are committed to consistent implementation of the ESA not only between our two agencies, but among all of our Regions.

NMFS employs about 260 people throughout its regions, field offices, science centers and headquarters to carry out our ESA responsibilities. Our total ESA ftmding for FY98 is $29.2 million and our FY99 request is $37.9 million. The requested increase covers additional money for Pacific salmon including recovery activities, Federal and State partnerships and actions to improve our science and management capabilities. The remainder of the increase would be used for activities to recover highly endangered marine mammals -- right whales, Hawaiian monk seals and steller sea lions. Base ftmding is used for Pacific salmon, marine mammals, sea turtles and other species.

Currently, NMFS is responsible for 38 listed species. Of the 19 species currently proposed for listing, 17 are stocks of chinook, sockeye and chum salmon and steelhead trout that range from southern California to the Canadian border. Because the range of marine and anadromous species usually covers vast geographic

areas, their habitat often includes a combination of private, state and Federal lands and waters.

Now, I would like to address the specific issues identified in your letter of invitation to this hearing.

ISSUE 1: THE CRITERIA AND PROCESS FOR ISSUANCE OF SECTION 10 INCIDENTAL TAKE PERMITS

The process for issuing incidental take permits and the criteria that applicants must satisfy is based on regulations published by NMFS in 1990 and 1998. Consistency between NMFS and FWS and among the Regions when issuing section 10 permits is assured through the Habitat Conservation Planning guidance issued jointly by both Services in 1996, and a final joint policy (with separate implementing regulations) on No Surprise assurances published February 23 in the FEDERAL REGISTER. Before NMFS issues a section 10 incidental take permit, it must be satisfied that the applicant has complied with the criteria for issuing a permit including the submission of an acceptable habitat conservation plan (HCP).

Because many HCP permits cover large tracts of land and may be in effect for many decades, these plans will determine, to a significant degree, the long term viability of many 3

anadromous species, particularly those whose populations are severely depressed. A permit holder must be required to implement measures that are necessary to ensure that the holder's activities do not appreciably reduce the survival and recovery of the species. In general, the objective of NMFS is the same in each HCP and for each species listed on a permit. Each HCP must provide for the essential habitat functions needed for the long-term survival of the species while permitting incidental take. The prevailing scientific view is that long-ten-n survival of imperiled salmonid species requires protection and restoration of local populations and their habitats. The measures sought by NMFS are designed to provide habitat that will support a diversity of local breeding populations and, therefore, are necessary for the species long-term survival.

ISSUE 2: A GENERAL DESCRIPTION OF THE HABITAT CONSERVATION PLANS ISSUED IN THE REGIONS

Currently, NMFS is working on about 50 large scale HCPs that are in various stages of development in California and the Pacific Northwest. A general description of each HCP is attached. To date, all large scale HCPs have been developed jointly with the Fish and Wildlife Service.

In addition to the large scale HCPS, NMFS has issued nine incidental take permits for activities such as state commercial and recreational fishing and state hatchery programs (list attached). The only East Coast permit was granted to North Carolina in 1996 for a 5-year period, and replaced the annual "Algae Rule" amendment to Federal regulations that allowed Using limited net tow times on shrimp trawlers in lieu of using turtle excluder devices (TEDS) because of high algae concentrations. The State was required to have an observer program to monitor takes under this permit.

ISSUE 3: THE MANNER IN WHICH LISTING AND DELISTING DECISIONS ARE MADE

The ESA and joint regulations by NMFS and FWS provide clear guidance on the factors that must be used to determine whether a species warrants the protection of being added to the list of threatened and endangered species or whether a species should be delisted. Listing determinations are made solely on the basis of the best available scientific and commercial information regarding the species status, without

reference to possible economic or other impacts of a determination. The regulations also require that we review the status of the species and determine whether a species is endangered or threatened because of the five factors that are specifically listed in the Act. Also, we must take into account efforts that are in progress by a state to protect the species. Between the time a species is proposed for listing and a final listing determination, it is NMFS' published policy to solicit the expert opinion of three independent specialists regarding the pertinent scientific or commercial data on the species being considered for listing. These peer review opinions are taken into account when NMFS makes the final determination and they are included in the final published notice.

With the decline of so many West Coast salmonids, NMFS began receiving numerous petitions to list additional populations. In response, the Northwest and Southwest regions initiated coast-wide status reviews of all salmon and steelhead stocks on a species-by-species basis. To handle these reviews, the regions formed Biological Review Teams made up of scientists from the Northwest Fisheries Science Center, Southwest Region, Southwest Fisheries Science Center and U.S. Geological Survey's Biological Resources Division. The teams conduct their reviews solely on the basis of the best scientific information available on the current status of the stocks and the present threats to their continued survival. Based on their reviews, the teams advise the regions on the identities of various ESUs (evolutionary significant units) and whether each ESU is in danger of extinction or likely to become in danger of extinction in the foreseeable future. To expand the review to experts outside the Federal government, a Pacific Salmon Biological Technical Committee consisting of tribal, state, federal, industry and academic scientists assists the temn in compiling and reviewing scientific information pertinent to the status review. The regions consider the analysis from the team and any conservation measures being undertaken by states, tribes, industries, local entities and the Federal government to determine whether those conservation measures mitigate threats to the species and whether a listing is warranted. Under certain circumstances, the regions may ask the team for a formal analysis of the likely effects of specific and quantifiable conservation measures, as was done in the case of hatchery and harvest reforms for Oregon coastal coho.

ISSUE 4: FUNDING OF PROGRAMS, ALLOCATION OF STAFF AND OTHER MATTERS PERTAINING TO IMPLEMENTATION AND ENFORCEMENT AT THE REGIONAL LEVEL

Attached is a description of the funding in FY98 for each NMFS Region, and the number of employees who work on issues related to the ESA. Also attached is the justification for the FY99 budget request and a summary of each region's major activities and accomplishments.

NMFS considers the protection of threatened and endangered species as one of its highest enforcement priorities. The Office of Law Enforcement is developing new techniques to meet the ever-increasing demands of the ESA. One technique is to create a highly mobile, rapid response marine enforcement team to protect sea turtles in the southeastern United States. On the West Coast, NMFS is designating an ESA enforcement coordinator for multi-regional action teams and multi-disciplinary ESA response teams. Although protecting listed species is only one of many enforcement responsibilities, potential violations receive high level scrutiny by Special Agents and Fishery Patrol Officers in all regions. The rapid expansion of the number of listed species, particularly salmon, and the need to monitor large geographic areas, has placed greater pressure on the limited resources of the enforcement staff. In 1997, the Office of Law Enforcement investigated 144 cases that included 151 counts for violations of the ESA.

ISSUE 5: THE GENERAL CRITERIA FOR REQUIRING MITIGATION AND EXAMPLES OF MITIGATION REQUIRED IN EACH REGION IN THE CONTEXT OF SECTION 10 PERMITS AND SECTION 7 INCIDENTAL TAKE STATEMENTS

When identifying measures to minimize or mitigate an incidental taking, NMFS uses the criteria identified in its regulations for both section 7 and section I 0, the guidance in the Habitat Conservation Planning handbook and the interim Section 7 Consultation handbook. Whether issuing an incidental take permit under section IO or conducting a consultation with a Federal agency under section 7, NMFS first determines whether the Federal or private action results in jeopardy for the species. This determination is made based on the biological requirements of the species, the current status of the species, the environmental baseline, and the effects of the proposed or continuing action on the species that is the subject of the opinion or permit.

If it is a section 7 consultation, and the determination is that the action is likely to jeopardize the species, NMFS identifies the reasonable and prudent alternatives that if taken would avoid the likelihood of jeopardy. Any action that results in a taking incidental to the proposed or continuing action requires NMFS to attach an incidental take statement to the opinion which identifies the reasonable and prudent measures (and the terms and conditions to implement the measures) that minimize the effect of the taking. Based on NMFS regulations, reasonable and prudent measures and the terms and conditions that implement them cannot alter the basic design, location, scope, duration or timing of the action, and may involve only minor changes.

If the subject is a section IO incidental take permit (which requires the applicant to first submit an acceptable habitat conservation plan or HCP), NMFS will describe in the permit and in an implementing agreement (if applicable) the measures that must be taken to monitor, minimize and mitigate the impacts of the taking. NMFS will not issue a section 10 incidental take permit that is likely to jeopardize a species. The applicant would have to modify the project so that it would not appreciably reduce the likelihood of the survival and recovery of the species in the wild in order to obtain a permit.

The Services assist the applicant in evaluating alternatives, and is flexible when prescribing mitigating measures. We do not impose one-size-fits-all prescriptions on applicants. When participants provide an unusual, but scientifically credible analysis of effects, or a creative but effective solution for mitigating the effects of incidental taking, we will approve their approach. The Services work with the Federal agencies, the applicant and the private, state or Tribal landowner to ensure that the measures are understood and technically feasible. Also, when a Federal agency consults with both NMFS and FWS on the same action, the two Services work together with the agency and the applicant to ensure that the measures are compatible and the agency is not overloaded with separate or conflicting requirements.

Examples of some of the terms and conditions to minimize incidental take through section 7 biological opinions follow. All of the measures described were agreed to by the individual Federal agencies and applicants and are consistent with the section 7 regulations on the criteria for reasonable and prudent measures. In some cases, the requirements are the result of a jeopardy opinion, and may change the scope or timing of the described action (e.g. dredging windows).

NMFS consulted with the State of Massachusetts and EPA concerning a sewage discharge permit for Boston harbor. The incidental take statement from the resulting biological opinion included requirements to: 1) monitor the effluent to detect large scale biological changes to avoid any possible impacts to endangered right whales and their habitat, 2) conduct observer programs and noise measurements associated with the use of explosives, and 3) use observers and turtle deflectors on dredges to ensure that the estimated incidental take is not exceeded. Consultations with the U.S. Coast Guard resulted in the requirement of the following measures: posting lookouts, reducing speed, providing training, and improving vessel operations to avoid interactions with listed species. Biological opinions related to commercial fishing activities have

required educating fishermen about methods to reduce the incidental take of listed species and posting observers on vessels to determine areas and seasons of conflicts with listed species for future consideration in refining the measures required in an incidental take statement. In consultations with power plants, the measures include requiring the modification of water intakes to reduce and eliminate takes of listed species. Protocols for transporting listed fish above dams to allow access to spawning grounds were also required. Other examples are requirements for observer programs associated with the explosive removal of oil rigs to ensure that detonations do not occur until listed species are no longer in the area; using turtle deflectors on dredge dragheads in channels and offshore sand "borrow areas" to protect sea turtles; and educational programs to teach crews on dredges and Navy and Coast Guard vessels how to reduce interactions with listed species.

ESA ACTIVITIES AND ACCOMPLISHMENTS OF EACH REGION

Northeast Region

NMFS' Northeast Region ESA program focuses on the protection of sea turtles, Atlantic salmon, sturgeon, and marine mammals.

Atlantic Salmon: In December 1997, NMFS and FWS withdrew their proposal to list a distinct population segment of Atlantic salmon as threatened under the ESA. That determination was based, in part, on the adequacy of existing protective mechanisms including a conservation plan developed by the State of Maine. NMFS has placed this population of Atlantic salmon on its candidate species list, and is actively monitoring the implementation of the State plan to determine whether it is effective and whether further action is needed to protect Atlantic salmon.

Atlantic sturgeon: In June 1997, NMFS received a petition to list Atlantic sturgeon throughout its range. NMFS and FWS are jointing conducting a status review of the species along with a team that includes Federal and state agency representatives. Several states oppose a listing and prefer to allow the Atlantic States Marine Fisheries Commission to complete an amendment to their fishery management plan that will close the commercial fishery coast wide. A 12-month finding by NMFS and FWS is due this June.

Shortnose Sturgeon: The Region published a draft recovery plan for this species earlier this year. Shortnose sturgeon are listed throughout their range from the Saint John's River in Canada to the St. John's River in Florida. The recovery describes a river-by-river approach for recovery and sets up measures to work cooperatively with Federal and state agencies and other interests to assess river populations, threats, and methods for recovery.

Marine Mammals: To protect marine mammals, the Northeast Region participates in teams mandated by the Marine Mammal Protection Act (MMPA) to reduce to acceptable levels the number of marine mammals caught incidental to commercial fisheries. The Atlantic Large Whale Take Reduction Plan contains regulations to reduce the impact of fishing interactions on one of the most critically endangered marine mammals, the right whale, by ensuring that gear regulated by this plan is either removed or significantly restricted in the three right whale critical habitats found in U.S. waters: Cape Cod Bay, Great South Channel and the Georgia-Florida border region. However, the main focus of the plan is to achieve the MMPA's long-term goal of reducing the incidental take of four large whale species (right, humpback, fin and minke whales) through a combination of gear modifications supplemented by progressive gear research, expanded disentanglement efforts, extensive outreach efforts in key areas, and a right whale surveillance (Early Warning System) program.

The Early Warning System is a partnership of 14 Federal and state agencies, private industry, port authorities, private conservation groups and Canada. Its purpose is to reduce ship strikes of right whales through a combination of dedicated and opportunistic aerial and ship surveys. If a right whale is spotted, the location is broadcast over marine radio bands to alert mariners of the whale's locations so they will post look-outs and avoid ship collisions. Each organization has a specific responsibility and has contributed by either providing funds, developing educational material, offering staff time or office space.

The combined effect of the actions taken under the plan will provide adequate protection for large whales and allow NMFS and the take reduction team to monitor the progress of the plan. The effectiveness of the program ultimately relies on the cooperative efforts of all entities represented on the Atlantic Large Whale Take Reduction Team (states, fishery councils and commissions, the fishing industry, conservation groups, and scientific advisors).

Southeast Region

The ESA program of NMFS' Southeast Region focuses on effects of human activities on marine mammals, sea turtles and Gulf and shortnose sturgeon.

Marine Mammals:

The Southeast Region has participated with the Northeast Regional Office in three marine mammal take reduction teams.

(a) The Atlantic Offshore Cetacean Take Reduction Team was charged with reducing interactions between. pelagic delphinids, humpback whales and right whales and the Atlantic longline, drift gillnet and pair trawl fisheries for swordfish, tuna and shark. The team submitted its consensus plan to NMFS in November 1996. The proposed rule implementing this plan is in the final stages of development.

(b) The Mid-Atlantic Take Reduction Team, convened to find ways to reduce interactions between fisheries and harbor porpoise (proposed threatened) in mid-Atlantic gillnet fisheries. It submitted a consensus plan to NMFS in September 1997. The proposed rule implementing this plan is expected to be published shortly.

(c) The Atlantic Large Whale Take Reduction Team. (Discussed above) NMFS' Southeast Region has also successfully partnered with other agencies in the Southeast U.S. Right Whale Recovery Plan Implementation Team. This team works cooperatively to prevent right whales from being struck by vessels in and near their critical habitat off the coasts of Georgia and Florida. This area is the animal's only known calving grounds. The team has produced a "Partnering Document" that describes the actions each entity has agreed to take to avoid ship collisions and was awarded the prestigious Coastal America Award for its efforts.

Sea Turtles: The Region has developed, implemented, and modified requirements for shrimp vessels in the region to use Turtle Excluder Devices (TEDs). The development of TEDs allowed the fishery to continue operating by reducing conflicts between the shrimp fishery and listed sea turtles. A panel of gear experts, including members of the shrimp industry, has been instrumental at successfully developing and testing new TEDs to address and reduce problems such as poor shrimp retention or insufficient turtle exclusion. A panel of scientists, including representatives of the fishery and the environmental communities, also has been established to evaluate the status and trends of listed sea turtle populations. The implementation of TEDS, along with the protection of nesting beaches, has resulted in a significant increase in the Kemp's ridley

population that provides grounds for cautious optimism that these measures are effective.

Regional scientists and managers also provide administrative and technical expertise for implementation of Public Law 10 I - 1 62, Section 609. NMFS provides technical training in the use of TEDs to foreign nations to help them meet the requirements of this law which prohibits the importation of shrimp into the United States that was harvested in a manner harmful to sea turtles. NMFS also provides technical expertise in evaluating the enforcement of foreign TED programs necessary for the annual certification of countries to Congress each year. In 1996, a court order expanded the program worldwide, and NMFS' training activities have increased significantly.

NMFS has proposed to designate critical habitat for green and hawksbill turtles in the waters around Culebra, Mona, and Monito Islands off of Puerto Rico. Comments heard during recent public hearings suggested that the proposal has been received favorably by local stakeholders. The Region also is working on the final determination on the Service's proposal to list Johnson's seagrass, which is found on the east coast of Florida.

Alaska Region

The Alaska Region's ESA program focuses on efforts to protect Pacific salmon and endangered or threatened marine mammals, notably steller sea lions and large whales.

The steller sea lion management and recovery program is a collaborative effort that includes research programs of the National Marine Mannnal Laboratory, State of Alaska, and the University Marine Mammal Consortium and section 7 consultations with Federal agencies.

Efforts to protect the humpback whale include section 7 consultations and the collection of biological data from stranded animals. The program for bowhead whales involves coordination on oil and gas development activities statewide, Section 7 consultations for Federally permitted activities, whale research, and extensive coordination with the Alaska Eskimo Whaling Commission and the oil industry regarding oil and gas exploration.

For Pacific salmon, the Region prepares biological assessments and coordinates fisheries management actions relative to take of listed Pacific salmon by Federally authorized commercial fisheries.

Major accomplishments for the Alaska Region include a partnership with the Alaska Eskimo Whaling Commission and continued research by the National Marine Mammal Laboratory showing that stocks of bowhead whales have increased at a rate of 3. 1 % from 1978 to 1993.

The Region expanded its efforts to address the human impact of the tourism industry on endangered humpback whales that feed in Alaskan waters in the summer months by developing guidelines for responsible viewing and by working closely with industry to ensure adherence to these guidelines.

Although Steller sea lions are continuing to decline in Alaska, the combined efforts under the Marine Mammal Protection Act, the Magnuson-Stevens Fishery Conservation and Management Act, and the Endangered Species Act contribute to evaluating current protection measures and determining additional conservation measures to aid the recovery of this species.

Northwest Region

The Northwest Region's ESA program centers entirely on the task of conserving, protecting and recovering anadromous species of salmon and trout. When the first Northwest salmonid species were listed in the early 1990s (Snake River sockeye and two populations of Snake River chinook), the Region embarked on an extensive program to protect and recover these species. It required working with numerous layers of state agencies, inter-state commissions, industries, Federal agencies, Tribes and private landowners. The Region has based its numerous decisions and determinations on a science-based management program. With recent listings and proposed listings of salmonids, the Region's endangered species program will involve even more stakeholders.

The Region's current management activities include implementing the Northwest Forest 16

Plan, conducting section 7 consultations with Federal agencies (including extensive consultations over the Federal Columbia River Power System), consulting with the Federal Energy Regulatory Commission on relicensing of hydropower facilities, working with States and non-Federal landowners to develop conservation plans, and reviewing Clean Water Act programs and U.S. Army Corps of Engineers' permits.

The Region considers its major accomplishments to be a genuine collaboration on development, implementation and consultation on the Northwest Forest Plan; the Washington State Department of Natural Resources Habitat Conservation Plan which covers more than one million acres of state owned land; completion of three additional HCPs with private forest landowners which cover over two million acres; the Oregon Coastal Salmon Recovery Initiative (State conservation plan for coho salmon); streamlining section 7 consultations on timber sales; a negotiated section 7 consultation with Douglas County (Washington) for a new water storage dam and reservoir that will service the county and its municipalities; the Eastside section 7 consultation on PACFISH and consultation on eight U.S. Forest Service Land and Resource Management Plans that cover all of the Snake River Basin Federal Land. These plans comprise over 60 percent of freshwater habitat for listed Snake River chinook and sockeye salmon. The NWR Region is also continuing to collaborate on the development of the Interior Columbia Basin Ecosystem Management Program.

Southwest Region

The Southwest Region is responsible for protecting and recovering endangered and threatened marine mammals (whales and monk seals), sea turtles, and salmonids. Its territory covers California and the Western Pacific. In the Western Pacific, it evaluates the effects of Federal actions such as commercial fishing on listed species of marine mammals, especially humpback whales and Hawaiian monk seals, and sea turtles. It is implementing an extensive recovery program for Hawaiian monk seals. Off the coast of California, the Region conducts surveys of gray whales in order to monitor the effects of delisting this species.

However, as you can see from last week's proposal by NMFS to add a dozen West Coast stocks of salmonids to the list of threatened and endangered species, the Southwest Region alone is now responsible for eleven populations of salmonids (both listed and proposed for listing). The first salmonid ever listed is the Sacramento River winter-run chinook salmon (1989). Because the habitat of winter-run chinook is primarily controlled by actions of Federal agencies, the conservation strategy for this species has required extensive section 7 consultations with the Bureau of Reclamation, the U.S. Army Corps of Engineers and with NMFS (commercial fishing). However, NMFS has brought successful legal action against private water diversion facilities that illegally took winter-ran chinook salmon. The quality and quantity of water necessary to restore winter-run chinook salmon brought about one of the most ambitious Federal and state partnerships, the Bay Delta Accords which has been extended through 1998 in order for the group

implementing the Accords to complete an environmental impact statement on the alternatives to restore the water quality of the Sacramento/San Joaquin Rivers and Delta and San Francisco Bay.

With the listing of coastal coho salmon and steelhead trout, the Region is turning its focus to forming more partnerships with state and private landowners, especially timber companies. An example is the agreement reached last Friday (February 27) between NMFS, FWS, the State of California and Pacific Lumber Company (Headwaters) on the principles related to the company's submission of a Habitat Conservation Plan pursuant to an ESA section 10 incidental take permit.

CONCLUSION

The ESA is working for non-Federal landowners as well as Federal agencies. This Administration has taken unprecedented action in the past 5 years to use the flexibility that is inherent in the ESA to make it work for Federal agencies, states, Tribes and private landowners. We have worked with our partner the U.S. Fish and Wildlife Service to ensure that the agencies are consistent in their treatment of both Federal and non-Federal actions that may affect listed species. We have provided guidance to our Regions to ensure that they are fair and provide consistent advise to Federal and private, state, or Tribal landowners.

We know that we must have the support of private landowners including states to recover species. We have met that sector at least halfway by demonstrating through actions such as the No Surprises Assurances and State Conservation Agreements that we are willing to provide incentives to encourage this sector to be our equal partners to conserve species. Its through partnerships with private, state and Tribal landowners, that species will have the best chance for long-term survival and recovery.

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